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No. 86-111

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ALAN R. STONEMAN,
Petitioner,
VS.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S BRIEF IN REPLY

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Petitioner, mindful of Rule 22.5 of the Rules of the Supreme Court of the United States, contends the brief of the Solicitor General raises new issues by: (1) mischaracterizing and relying on facts not supported by the evidence; (2) mischaracterizing the factual and legal issues disposed of by *United States v. Stratton,* 779 F.2d 820 (2d Cir. 1985), requiring this Court to lay to rest the constitutional issues as raised by Petitioner; and, (3) by misconstruing Code of Federal Regulations, Title 42, Section 2.61, et seq., 42 Section 2.63 raising the issue of whether that regulation protects the interests claimed by the Solicitor General.

I.

THE SOLICITOR GENERAL BLARINGLY MISCONCEIVES THE HOLDING OF *U.S. V. STRATTON* AS THAT CASE NEVER RULED ON THE CONSTITUTIONAL ISSUES RAISED BY PETITIONER.

Petitioner's trial started with an original cross-section of 12 jurors, ending with a cross-section of only 11. The Solicitor General claims that "the only other federal court to consider the question, as the Third Circuit did here, that the provision (Rule 23(b)) is constitutional" was *United States v. Stratton,* supra.[1] (Brief in Opposition, pp. 7-8). However, the Solicitor General misinterprets *Stratton,* which relied upon *Williams v. Florida,* 399 U.S. 78 (1970). However, Petitioner's is not a *Williams* case! Nor are the issues raised by Petitioner those considered, let alone decided by *Williams.*

These cases did not discuss the novel issues of first impression raised by Petitioner. The interpretation of *Stratton* by the Solicitor General raises such an important federal question that a ruling by this Court is essential to settle the contitutional issues raised by Petitioner and the Solicitor General regarding the discretionary aspect of Rule 23(b) and its material impairment of a defendant's constitutional substantive rights.

Stratton only discussed the appropriate number for a selected constitutional jury. However, Petitioner does not claim, as contended by the Solicitor General, that a constitutional jury requires the magic number of 12. Petitioner contends that whatever number of jurors a trial begins with, *that* number *then* becomes magic because any reduction of *that* number destroys the unanimity of

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[1]The Solicitor General apparently disagrees with the 3d Circuit Court of Appeals claim that *U.S. v. Gambino* 598 F. Supp. 646 (D.N.J. 1984) held Rule 23(b) constitutional.

the verdict through the loss of the original cross-section of the community from which the jury was originally selected. The balance of the representative cross-section of the community in which the case is tried becomes unconstitutionally altered. *Stratton,* like *Williams,* did not discuss, let alone determine, such issues nor stand for the proposition cited by the Solicitor General and the court of appeals.

Petitioner contends that there is a significant import to the originally selected cross-section comprising a jury, regardless of whether that number be 6, 9 or 12. In *Williams,* the defendant started his trial with 6 jurors and presumably selected his cross-section of jurors accordingly. Mr. Williams did not lose the unanimity of that original cross-section. Petitioner did and the unanimity of his original jury's nature was significantly altered.

The Solicitor General wants this Court to believe such issues were raised and determined by *Stratton*, when, in fact, they were not. The Solicitor General's contention that *Stratton* held Rule 23(b) constitutional, is misleading and an improper bootstrap technique to determine such an important novel federal question of first impression and unconstitutionally affects Petitioner's substantive rights.

Petitioner has a contitutional substantive right to the unanimous vote of the original cross-section of jurors that he selected in starting his trial. Such issue is separate and distinct from that of a unanimous vote of the remaining jurors as suggested by the Solicitor General.

This vital and important concept of unanimity of the original cross-section was recognized by this Court in *Patton v. United States*, 281 U.S. 276, 298, 50 S.Ct. 253 (1930) in which it was held:

> "Not only must the right of the accused to a trial by constitutional jury be zealously preserved but the *maintenance of the jury as a fact finding body* in criminal cases *is of such importance* and has such a place in our tradition that before any waiver can become effective, the consent of government counsel and the sanction of the court must be had *in addition to the express and intelligent consent of the defendant.*" [emphasis added].

Under the presumption of innocence guaranteed by our Constitution, Petitioner must be given the benefit of any doubt as to the prejudice he suffered by the loss of his 12th juror who had her own opinions, consideration and effect on the other jurors. These considerations are inherent in Petitioner's most important constitutional substantive right to a trial by jury. This salient aspect of the jury system was recognized by the Third Circuit Court of Appeals when it observed in *United States v. Scalzitti,* 578 F.2d 507 (1978);

> "Unanimity serves to effectuate the purpose of the jury system by promoting the *full expression of the views of all members of the jury and by insuring that those views are taken into account as fully and thoroughly as possible in reaching a verdict . . .*" [emphasis added].

The Solicitor General relies upon the "strong public interest in completing a trial, like petitioner's, that has consumed vast public resources" (Brief in Opposition, p. 7). Such raises the factual issue of which portions of those "vast resources" were devoted to the government's case against Petitioner, as opposed to Smith, and further demonstrates the prejudice suffered by Petitioner in having to be co-tried with Smith. Had Petitioner been separately tried, his trial, like that of Robert Stone's separate trial, would not have lasted but approximately two weeks.

The "vast public resources" consumed in Petitioner's co-trial dealt with issues with which Petitioner had no involvement. The principles of judicial economy should never take precedence over one's basic constitutional right to seek Justice.

This Court must consider the issues raised by Petitioner, as well as those new issues raised by the Solicitor General in its brief vis-a-vis this Court's rule making authority granted it by 18 U.S.C. 3771. As herein-above pointed out, Petitioner's affected rights were substantive not procedural. It can be inferred that this Court merely overlooked the nature of the rights it sought to affect in amending Rule 23(b). For the sake of Justice, the potential for misuse of Rule 23(b), as occurred to Petitioner, ought be re-examined.

II.

THE SOLICITOR GENERAL GROSSLY MISSTATES THE EVIDENCE AND SETS FORTH FACTS NOT CONTAINED IN THE RECORD.

It is easy for the Solicitor General to say that the jury easily compartmentalized the evidence. However, the trial judge, the court of appeals, and even the Solicitor General are not able to do so. The Solicitor General's brief is replete with misstatements of evidence nowhere contained in the record. Such reflects the prejudice suffered by Petitioner in being forced into a co-trial with Smith. Specifically, the solicitor General erroneously claims:

> (1) "The contract was signed by Torquato on Stoneman's behalf" (Brief in Opposition, p.4). Such statement even conflicts with the court of appeals "finding" that "Stoneman executed the contract on behalf of CTA, Ltd.", Appendix A, slip op. at 4. In Truth, Petitioner DID NOT execute the contract.

Torquato admitted that Petitioner did not draft it nor sign it as it was only sent to Petitioner *after* the work on the contract had been completed;

(2) "The conspirator's plan was to furnish Herbert and other officials with stock in Com-Max which would increase in value if the officials used their influence and authority to award excessively profitable FICA recovery contracts to CTA or other companies associated with Com-Max. (Brief in Opposition, p. 4). Again there is discrepancy with the "finding" of the court of appeals which stated: "some of the profits from the FICA contracts were to be used to make the Com-Max stock valuable and, therefore, to benefit the public officials who were given Com-Max stock and stock options." Appendix A, slip op. at 5. In Truth, the evidence proved the profits from the only two completed contracts were not so used;

(3) "An Accounting firm eventually performed the work required by the $6 million contract for between $845,000 and $1,300,000" (Brief in Opposition, p. 6). The court of appeals however "found" that "The contract was ultimately performed by an accounting firm, Levin-Horwith, for $1,300,000", Appendix A, slip op. at 6. In Truth, the evidence proved: no firm, let alone Levin-Horwith, performed the contract and to this day that contract has never been performed;

(4) "Smith and Torquato, with Stoneman's knowledge, formed a new corporation to try to hide the connection between Com-Max and Computer Technology Associates, Inc." (Brief in Opposition, pp. 5-6). However, there was absolutely no evidence to even suggest Petitioner was aware of that corporation formed by Smith in June of 1984. The Solicitor General's misunderstanding of the evidence differs

> from the misunderstanding of the court of appeals which stated: "Stoneman .... did not file the corporate documents that would have identified the officers of the corporation and disclose its connection to CTA, Ltd." Appendix A, slip op. at 5.

In Truth, Petitioner DID FILE all documents he was permitted by California law to file which, in fact, publicly connected Com-Max, Inc. to CTA, Ltd. Petitioner was named in those documents as the incorporator and initial agent for service of process, giving the State of California jurisdiction over Com-Max, Inc. as well as identifying Petitioner's association with it. As Petitioner was also a publicly disclosed officer of XET, Ltd. dba CTA, Ltd. this fact created and disclosed Com-Max's connection with CTA, Ltd.! A documented connection the Solicitor General and court of appeals state did not exist!

It is clear: when evidence is relatively uneasy to follow and lacks straight-forwardness, the more difficult it becomes for evidence to be compartmentalized by the jury. *Williamson v. United States* 310 F.2d 192, 198 (9th Cir. 1962). The case against Smith and Petitioner lasted 3 months in which 106 witnesses testified. These logistical facts alone raise serious doubt as to the straight-forwardness and relative ease with which the evidence was presented and absorbed by the jury.

That Petitioner was acquitted of 15 substantive counts, while Smith was convicted of several, is not dispositive nor persuasive that the jury understood and easily marshalled the evidence pertaining to him. The record reflects the jury's extreme state of confusion on the charges given them pertaining to the laws of conspiracy for which they sought clarification on 3 separate occasions. Had they easily marshalled and understood the evidence as claimed by the Solicitor General and court of appeals, then logically Petitioner could not have been acquitted of Count B

for his overt actions which allegedly formed the basis of his participation in the conspiracy. This blatant incongruity demonstrates the jury's inability to place the evidence in its proper "compartment".

Whether the allegation of conspiracy against Petitioner was made in "good faith", and thereby a "sufficient reason for trying the conspiracy and all substantive offenses together", is seriously questionable. The record reveals Petitioner was not even going to be indicted. A separate trial would have only lasted approximately two weeks. Importantly, a separate trial would have been a Fair trial. Truth would not have been buried as it was in his protracted and convoluted co-trial.

III.

THE SOLICITOR GENERAL'S MISCONSTRUCTION OF CODE OF FEDERAL REGULATIONS, TITLE 42, SECTIONS 2.61, ET SEQ., 42 SECTION 2.63 REQUIRES THIS COURT TO DETERMINE WHAT PUBLIC INTERESTS ARE PROTECTED THEREBY.

The Solicitor General posits that 42 U.S.C. 2.61, et seq. 42 SECTION 2.63 is based upon "the public interest requiring confidentiality" (Brief in Opposition, p. 10). However, a reading of Section 2.61 clearly indicates that the public's interest is for *disclosure*, not non-disclosure! This interest and need for disclosure is to be weighed against the injury to *the patien*, the physician-patient relationship and the treatment services that could result upon *unconsented* disclosure.

In the case at Bench, the patient (Torquato) clearly and unequivocally waived any such interests he had and consented to their disclosure! The Solicitor General, as did the court of appeals, misconstrues the interest to be protected and balanced against. Petitioner's need for

disclosure of all relevant and material information which might have shed light on Torquato's state of mind and memory during the pertinent time-frame of his scheme clearly prevails in any weighing test. The scales of Justice clearly tips in the direction of disclosure.

Petitioner demonstrated "good cause" for disclosure even though the trial court denied him the opportunity to make a clearer showing when it refused to conduct an in-camera inspection of those medical records as Petitioner requested during trial. Because those records were never viewed, the Solicitor General, as did the court of appeals, speculates they "would have only marginally helped impugn Torquato's credibility". Does our legal system now dispense Justice by assuming what is Truth?

The Solicitor General rejects Petitioner's claim that he was denied his constitutional right to compulsory due process on the grounds that the court of appeals' similar rejection was "fact-specific". Such a position raises the issue of the right of compulsory due process being indistinguishable from the right of confrontation. However, such a contention fails to follow the distinction between those rights as stated by this Court in *Davis v. Alaska* 415 U.S. 308 (1974).

Petitioner's only involvement in this case was his performing acts normally requested of attorneys by their small business clients. Torquato was the only witness who testified that those otherwise innocent acts were performed with full knowledge of their unlawful object. Petitioner had a right to present all relevant and material evidence that could possibly have demonstrated the basis for Torquato's inherently incredulous testimony on this issue. Such evidence might have even shed light in explaining Torquato's ability to have materially altered his testimony as he did in the subsequent trial of Robert Stone, who was acquitted for taking the very items sent

him by Petitioner, which Torquato claimed, in the case at Bench, to have been bribery and for which Petitioner was convicted!

CONCLUSION

It is respectfully urged that this Court put a stop to the constant misstatements and misunderstanding of the evidence in this case as against Petitioner. The fact that the trial court, court of appeals and Solicitor General can not properly understand and compartmentalize the evidence demonstrates the jury's inability to have done so. Petitioner was denied Justice and deprived of his constitutional substantive rights. This Court must review Rule 23(b) in light of the issues raised by Petitioner and which have never been decided.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 10, 1986, I served the within Petitioner's Brief in Reply in re: "Alan R. Stoneman v. United States of America" in the United States Supreme Court October Term 1986 No. 86-111;

on the parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

John Rodgers Carroll
Carroll & Carroll
615 Chestnut Street, Suite 1206
Philadelphia, Pennsylvania 19106

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 10, 1986, at Los Angeles, California

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